Supreme Court, U.S.
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No. 92-730

In the Supreme Court of the United States

OCTOBER TERM, 1992

INSURANCE COMPANY OF NORTH AMERICA, PETITIONER

v.

UNITED STATES DEPARTMENT OF LABOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENT IN OPPOSITION

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QUESTION PRESENTED

Whether the 1972 amendment to Section 3(a) of the Longshore and Harbor Workers' Compensation Act, 33 U.S.C. 903(a), which expanded the Act's coverage to include additional land-based injuries, applies to an employee exposed to asbestos before 1972 on a situs not then covered by the Act who becomes disabled and dies after the effective date of the 1972 amendment.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 2a-20a) is reported at 969 F.2d 1400. The decision of the Benefits Review Board (Pet. App. 34a-44a) is reported at 25 Ben. Rev. Bd. Serv. (MB) 71 (1991). The decision of the administrative law judge (Pet. App. 24a-33a) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on July 16, 1992. The petition for a writ of certiorari was filed on October 13, 1992. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. From 1962 until 1967, decedent Paul Peterson was employed as a carpenter and joiner at a Connecticut shipyard operated by General Dynamics Corporation; petitioner was the workers' compensation carrier for the shipyard's employees. Peterson was exposed to asbestos while working in the shipyard's Model Shop and in its Joiner Shop, both of which were located on land adjacent to a navigable river. He also worked aboard submarines on the river. Pet. App. 5a-6a, 26a.

On November 3, 1984, Peterson was hospitalized for shortness of breath, and tests revealed that he had lung cancer. He died at age 76 on December 1, 1984; the death certificate reported the cause of death as metastatic lung cancer due to chronic obstructive lung disease. Pet. App. 6a, 27a. Three physicians later diagnosed his tumor as metastatic adenocarcinoma and offered varying opinions as to the respective contributions of asbestos exposure and cigarette smoking to his disease. *Id.* at 28a-30a. Peterson's widow, respondent Freelove Peterson, filed timely claims for both lifetime disability and death benefits under the Longshore and Harbor Workers' Compensation Act (LHWCA or Act), 33 U.S.C. 901 *et seq.* Pet. App. 6a, 27a-28a.

2. After a hearing, a United States Department of Labor administrative law judge (ALJ) found no liability under the Act. Pet. App. 24a-33a. As a threshold matter, the ALJ held that LHWCA coverage is determined "with reference to the law in effect at the time of the event which caused the injury, regardless of when the full effect of the injury becomes manifest." *Id.* at 30a. Since Peterson's work-related asbestos exposure occurred from 1962 to 1967, the ALJ applied the Act's coverage provision, Section 3(a), as it existed before its amendment in 1972. 44 Stat. 1426. Pet. App. 30a. Prior to 1972,

the LHWCA provided compensation only for "disability or death result[ing] from an injury occurring upon the navigable waters of the United States (including any dry dock)." 33 U.S.C. 903(a) (1970). The ALJ found "no direct evidence" that Peterson had been exposed to asbestos aboard submarines during the course of his employment with General Dynamics, and thus concluded that there was "no exposure to asbestos on a situs covered by the pre-1972 Act" and consequently no injury within the coverage of the Act. Pet. App. 30a.[1]

3. The Benefits Review Board, sitting en banc, reversed and awarded benefits. Pet. App. 34a-44a. The Board noted that it had previously determined, like the ALJ in this case, that coverage should be governed by the law in effect at the time of exposure to the injurious stimuli, regardless of when the full effect of that exposure became manifest. *Id.* at 36a-37a. In this case, however, the Board decided to change its approach and to determine coverage under the Act "with reference to the law in effect at the time an injury becomes manifest, not at the time of the event which caused the injury." *Id.* at 39a.

In reaching that conclusion, the Board relied heavily on the Ninth Circuit's decision in *SAIF Corp./Oregon Ship* v. *Johnson*, 908 F.2d 1434 (1990), which held that the 1972 amendment expanding coverage under the LHWCA was applicable to occupational diseases that manifest themselves after 1972 as a result of pre-1972 exposure to hazardous materials. Pet. App. 37a-39a. The Board also relied on what it described as a continuing "trend" towards using the time of manifestation of occupational

[1] The ALJ also addressed the merits of the claims, finding "no substantial medical evidence of a relationship between" Peterson's employment from 1962 to 1967 and his lung cancer and death in 1984. Pet. App. 32a.

disease to decide various issues under the LHWCA. *Id.* at 38a. It observed that two courts of appeals have applied a manifestation rule to decide other LHWCA coverage issues. *Ibid.* (citing *Railco Multi-Construction Co.* v. *Gardner*, 902 F.2d 71, 74-76 (D.C. Cir. 1990), and *Castorina* v. *Lykes Bros. S.S. Co.*, 758 F.2d 1025 (5th Cir.), cert. denied, 474 U.S. 846 (1985)). In addition, the Board noted that the 1984 amendments to the LHWCA had codified the manifestation rule with respect to several other provisions of the Act. Pet. App. 37a-38a. Accordingly, the Board decided to overrule its previous decisions and henceforth follow *SAIF Corp.* in all circuits. Pet. App. 39a.

The Board then found that Peterson was a covered employee under the LHWCA as amended in 1972. Pet. App. 39a-41a. In particular, he met the "situs" requirement for coverage under the Act because the entire shipyard facility where he worked was a covered situs under the 1972 amendment to Section 3(a). Pet. App. 39a-40a.[2] The Board then concluded that benefits should be awarded. *Id.* at 44a.[3]

4. The court of appeals affirmed, with one judge dissenting. Pet. App. 2a-20a. The court characterized the issue before it as "whether the expanded situs requirement provided after the 1972 amendments applies to employees and their survivors if the employee was exposed before the effective date of the amendments, but was disabled or died after [that date]." *Id.* at 8a-9a. Because the coverage provision of the Act is triggered by an injury

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[2] Accordingly, the Board found no need to decide whether Peterson would have been covered under the pre-1972 version of the Act by virtue of his work on submarines. Pet. App. 41a n.6.

[3] In so doing, the Board reversed the ALJ's finding regarding causation, concluding that the ALJ had improperly placed the burden of proving a relationship between the injury and employment on the claimant. Pet. App. 41a-44a.

causing disability or death, 33 U.S.C. 903(a), the court believed that it had to "determine when Peterson was injured in order to determine which situs requirement to apply." Pet. App. 9a.

In making the date-of-injury determination, the court refused to defer to the position of the Director, Office of Workers' Compensation Programs, United States Department of Labor, that Peterson's injury occurred on the date he was last exposed to asbestos. The court explained that the Director's construction of Section 3(a) was "unreasonable." Pet. App. 9a.

Instead, the court of appeals held that Peterson's injury occurred at the time it manifested itself. Pet. App. 9a-12a. The court relied on a number of cases applying the manifestation rule under the LHWCA, and in particular on *SAIF Corp.*, *supra*, which gave three reasons for adopting that approach in determining coverage under the LHWCA's situs requirement: First, the manifestation rule "best comports" with the LHWCA's remedial purpose; second, "the date of manifestation most realistically defines when the injury occurs"; and third, the "trend in statutes and court decisions" favors application of the manifestation rule. Pet. App. 10a.

The court also relied on a series of cases applying another 1972 amendment in a manner that expanded the death benefits payable under the LHWCA when a worker who was injured before 1972 died after the effective date of the amendment. Pet. App. 12a-13a. Those cases held that the amendment was not being applied retroactively because it was being applied only to deaths occurring after 1972, even though the underlying injuries pre-dated the amendment. *Id.* at 13a. Accordingly, the court of appeals concluded that "the Director's contention that use of the date of manifestation results in retroactive application of the 1972 amendment is incorrect." *Ibid.*

District Judge Martin, sitting by designation, dissented. Pet. App. 14a-20a. Judge Martin disagreed with the majority's conclusion that its adoption of a manifestation rule did not result in a retroactive application of the 1972 amendment. *Id.* at 15a. In his view, "the majority creates a legal liability for Peterson's employer that did not exist at the time of his employment." *Ibid.* Furthermore, he deemed the majority's reasoning illogical because, if the majority was correct in concluding that Peterson's injury occurred in 1984 when the cancer manifested itself, then he was injured "in the hospital where the medical tests were administered, not 'upon the navigable waters' or any adjoining area under the control of General Dynamics." *Ibid.*

Judge Martin also criticized the majority's reliance on the reasoning of *SAIF Corp.* because that court "failed to consider the crucial distinction between applying a new rule retroactively to create an entirely new liability, and the retroactive application of a statute dealing only with procedures or remedies." Pet. App. 15a-16a. In particular, Judge Martin explained that the case principally relied on in *SAIF—Todd Shipyards Corp.* v. *Black*, 717 F.2d 1280 (9th Cir. 1983), cert. denied, 466 U.S. 937 (1984)—concerned "the extent of an existing liability," not the creation of a new substantive liability. Pet. App. 16a. Moreover, *Black* in turn relied primarily on cases involving "a procedural issue—the tolling of the statute of limitations—rather than a new substantive claim." *Ibid.*

Accordingly, Judge Martin concluded that the majority was in fact applying the 1972 amendment retroactively to impose a new substantive liability on petitioner. Pet. App. 18a-19a. In his view, such an approach was permissible only if Congress intended that result. *Id.* at 19a. Judge Martin found no evidence of such an intention, and concluded that the three factors outlined in

Bradley v. *Richmond School Bd.*, 416 U.S. 696 (1974), supported his view that the 1972 amendment was not retroactive, because retroactive application of the expanded situs requirement would work a "manifest injustice" upon employers not covered by the LHWCA before 1972. Pet. App. 19a-20a.

ARGUMENT

Although the Director, Office of Workers' Compensation Programs, disagrees with the court of appeals' conclusion that the 1972 LHWCA coverage amendments are applicable to pre-1972 employment events, review by this Court is not warranted. The court's interpretation of the LHWCA does not conflict with any decision of this Court or of any other court of appeals. Moreover, the practical impact of the decision appears to be quite limited, as only two cases raising this issue have reached the courts of appeals in the two decades since the 1972 amendments. Accordingly, the issue presented does not involve an important question of federal law that warrants resolution by this Court. In addition, even under the correct interpretation of the LHWCA the claimant was entitled to an award of benefits on the facts of record.

1. Until 1972, the LHWCA provided compensation only to employees who suffered "disability or death result[ing] from an injury occurring upon the navigable waters of the United States (including any dry dock)." 33 U.S.C. 903(a) (1970); § 3(a), 44 Stat. 1426 (1927); see *Nacirema Operating Co.* v. *Johnson*, 396 U.S. 212 (1969). In 1972, Congress expanded the Act's coverage to encompass injuries on land adjacent to navigable waters, including injuries occurring on a "pier, wharf, dry dock, terminal, building way, marine railway, or other adjoining area customarily used by an employer in loading, unloading, repairing, or building a vessel." Pub. L. No. 92-

576, § 2(c), 86 Stat. 1251 (1972); see *Northeast Marine Terminal Co.* v. *Caputo*, 432 U.S. 249 (1977). Coverage was extended to avoid a "substantial disparity in benefits payable to a permanently disabled longshoreman, depending on which side of the water's edge the accident occurred," because state laws compensating land-based injuries typically provided lower benefit levels. H.R. Rep. No. 1441, 92d Cong., 2d Sess. 10 (1972). The goal of the amendment was "to permit a uniform compensation system to apply to employees who would otherwise be covered by this Act for part of their activity." *Id.* at 10-11.

The general effective date for the 1972 amendments to the LHWCA was 30 days after the date of enactment. Pub. L. No. 92-576, § 22, 86 Stat. 1265 (1972). In addition, both the House and Senate committee reports state that: "[t]he Committee intends that the extensions of coverage and the additional rights afforded to widowers will apply only to cases of deaths or injuries occurring on or after the effective date of these amendments." H.R. Rep. No. 1441, *supra*, at 13; S. Rep. No. 1125, 92d Cong., 2d Sess. 16 (1972). Thus, Congress clearly did not intend that amended Section 3(a) would extend coverage for injuries occurring prior to 1972.

It is equally clear that, for purposes of determining coverage under Section 3(a), an injury "occur[s]" at the time of the employee's exposure to harmful stimuli in the workplace, not when the occupational disease actually manifests itself at some later date. Section 3(a) authorizes compensation only "if the disability or death results from an injury occurring upon the navigable waters" or (since 1972) in adjoining areas. 33 U.S.C. 903(a). This statutory language establishes that the injury must occur on the covered situs, and not elsewhere, in order for the Act to apply. Accordingly, the court of appeals' holding that an injury does not occur until it manifests itself is irreconcilable with the statute's text,

because the manifestation of the injury will frequently occur at a place far removed from the covered situs. As the dissenting judge noted below (Pet. App. 15a), under the majority's manifestation rule the place of injury for purposes of Section 3(a) could just as easily be a hospital as a worksite; the statutory language forbids that result.

The 1984 amendments to the LHWCA provide further support for this interpretation of Section 3(a). The 1972 version of the LHWCA did not explicitly adopt a manifestation rule for any purpose. In contrast, the 1984 amendments expressly adopted a manifestation rule to define the "time of injury" for several purposes. Pub. L. No. 98-426, § 10(a)(2), 98 Stat. 1647 (1984), codified at 33 U.S.C. 910(i) (adopting manifestation rule to calculate average weekly wages); Pub. L. No. 98-426, §§ 11(a), 12, 98 Stat. 1648, 1649, codified at 33 U.S.C. 912(a) and 913(b)(2) (adopting manifestation or awareness rule to trigger notice and statute of limitations provisions); Pub. L. No. 98-426, § 28(c) and (g)(1), 98 Stat. 1655 (time of injury for determining applicability of 1984 coverage amendments is time of awareness of disease, not of disability).

Subsequent legislative history is at best an uncertain guide to the intent of a prior Congress (*Pension Benefit Guaranty Corp.* v. *LTV Corp.*, 496 U.S. 633, 650 (1990)), but the 1984 committee reports make clear that Congress understood the time of "injury" under then-existing law to be something other than the time of manifestation of the disability, and amended several provisions of the Act precisely in order to change that result in specific contexts. Thus, with respect to Section 12 of the Act, the House Report commented that, "unlike traumatic occurrences, the period of time between the 'injury' and the arising of a compensation claim in * * * a long-latency occupational disease case may be so long as to make the requirement that the employee file a

Notice of Injury within thirty days of the 'injury,' nonsensical." H.R. Rep. No. 570, 98th Cong., 1st Sess. Pt. 1, at 10 (1983). Likewise, with respect to Section 13 of the Act, "triggering the statute of limitations for the filing of compensation claims on the date of 'injury' makes little sense in the context of an occupational disease in which the disabling condition or the death does not follow immediately on the 'injury.'" H.R. Rep. No. 570, *supra*, at 11.

While certainly not conclusive in itself, this legislative history suggests that when Congress wanted to define the time of injury under the LHWCA as the date of manifestation of a disease or disability, it did so expressly. The 1972 amendments contain no hint that Congress intended to adopt a manifestation rule for coverage determinations. Thus, we believe that Congress meant the 1972 expansion of coverage to apply only to future employment events, whether traumatic accidents or injurious exposures, and not to pre-1972 exposures to hazardous substances that manifest themselves as occupational diseases in future years.[4] The reasoning of the Ninth Circuit in *SAIF Corp.* and of the court of appeals below is therefore erroneous.

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[4] This conclusion is not undermined in any way by this Court's recent decision in *Bath Iron Works Corp.* v. *Director, OWCP*, No. 91-871 (Jan. 12, 1993), slip op. 10-12. To be sure, the Court in that case did observe that "a worker who has been exposed to harmful levels of asbestos suffers no injury until the disease manifests itself years later." *Id.* at 10; see also *id.* at 12. That observation, however, was made in the context of the Court's analysis of new Section 10(i) of the Act, which expressly adopts a manifestation rule for determining the time of injury for purposes of calculating an employee's average weekly wage. 33 U.S.C. 910(i). Thus, that observation is of no relevance to the proper construction of Section 3(a), which contains no express manifestation rule and in fact indicates that the time of injury for coverage purposes is the time of the employee's exposure to the harmful stimuli.

2. Quite apart from the above statutory analysis, we agree with the dissenting judge below that because the majority "creates a legal liability for Peterson's employer that did not exist at the time of his employment" (Pet. App. 15a), it effectively mandates retroactive application of the 1972 coverage amendments. Under the Act, only a covered employer "shall be liable for and shall secure the payment to his employees of the compensation payable" under the LHWCA. 33 U.S.C. 904(a). A covered "employer" is defined as any employer "any of whose employees are employed in maritime employment, in whole or in part, upon the navigable waters of the United States" or adjoining areas. 33 U.S.C. 902(4). An employer's duty to secure the payment of compensation may be fulfilled either by purchasing insurance or by obtaining permission from the Secretary of Labor to act as a self-insurer. 33 U.S.C. 932. In either case, the employer's liability under the LHWCA is based upon the existence of employees working in covered employment. If an employer had no covered employees under pre-1972 law, it had no legal duty and no reason to purchase or provide insurance to cover potential LHWCA liabilities.

This fact is significant because LHWCA insurance is not available to employers on a "retroactive" basis. Under the terms of any standard workers' compensation policy, coverage turns on whether the liability in question derives from employment during the policy period, not on the occurrence of disability or death within that period. See, *e.g.*, *Pennsylvania Nat'l Mut. Casualty Ins. Co.* v. *Spence*, 591 F.2d 985, 987 (4th Cir.), cert. denied, 444 U.S. 963 (1979); *Todd Shipyards Corp.* v. *Black*, 717 F.2d 1280, 1291-1292 (9th Cir. 1983), cert. denied, 466 U.S. 937 (1984). Accordingly, the decision below imposes on employers a new substantive liability that they had no way of anticipating or (in some instances) insuring against before the 1972 amendments.

"Retroactivity is not favored in the law." *Bowen* v. *Georgetown Univ. Hosp.*, 488 U.S. 204, 208 (1988). Accordingly, "congressional enactments * * * will not be construed to have retroactive effect unless their language requires this result." *Ibid.* Nothing in the language of Section 3(a) as amended in 1972 requires that it be applied retroactively; to the contrary, as noted above (Point 1, *supra*), the legislative history of the 1972 amendment reflects Congress's intent that the extension of coverage under amended Section 3(a) should be applied prospectively only. The court of appeals therefore erred in applying amended Section 3(a) in this case.[5]

Construing the 1972 amendment to have exclusively prospective effect would avoid the logical absurdity of awarding benefits to a person who *never* worked in covered employment. The fundamental prerequisite for all workers' compensation statutes is that the compensable

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[5] In *Kaiser Alum. & Chem. Corp.* v. *Bonjorno*, 494 U.S. 827, 837 (1990), the Court noted that the general presumption against retroactivity was "[i]n apparent tension" with cases such as *Bradley* v. *Richmond School Bd.*, 416 U.S. 696 (1974), and *Thorpe* v. *Housing Auth.*, 393 U.S. 268 (1969), which appeared to announce a contrary rule. A concurring opinion in *Kaiser* set forth the reasons why *Bowen*, rather than *Bradley* and *Thorpe*, states the proper rule to be applied in judging whether congressional enactments should be given retroactive effect. See generally *Kaiser Alum.*, 494 U.S. at 840-858 (Scalia, J., concurring). Moreover, it is open to question whether *Bradley* and *Thorpe* would have any application in this case in any event; properly construed, those cases involve "a special rule applicable to changes in law after initial adjudication." *Id.* at 854. Section 3(a) was amended in 1972, long before the commencement of this proceeding, and thus the *Thorpe-Bradley* rule would seem inapplicable here on its own terms. Finally, as Judge Martin noted in dissent below (Pet. App. 19a-20a), the result would be the same in this case under either *Bowen* or *Bradley*, because retroactive application of Section 3(a) would upset the settled expectations of employers and insurers and thus would lead to "manifest injustice." *Bradley*, 416 U.S. at 717.

injury "aris[e] out of and in the course of employment." 33 U.S.C. 902(2); 1 A. Larson, *The Law of Workmen's Compensation* §§ 1.10, 6.00 (1992). Under the LHWCA, the injury must take place on a covered situs to be within the limited purview of the Act. But, on the facts as found by the ALJ, Peterson at no time worked on a covered situs: when he worked at the shipyard, it was not covered; and when it was covered, he did not work there. While there is presumably no constitutional impediment to extending coverage in such circumstances (see *Usery* v. *Turner Elkhorn Mining Co.*, 428 U.S. 1 (1976)), neither logic nor fairness commends such a result absent a plain statutory expression of congressional intent.

3. Although the Director disagrees with the analysis employed by the majority below, further review is not warranted. There is no conflict in the circuits; the decision is consistent with the only other appellate opinion addressing the precise issue presented here. Moreover, the issue of the retroactivity of the 1972 amendment to Section 3(a) has arisen only rarely. Unlike a traumatic injury, which necessarily occurs at a particular location that is either fully within or fully outside the scope of the Act, exposure to substances causing occupational diseases often occurs over a period of time in both covered and non-covered locations, as a longshoreman or shipyard worker moves back and forth in the course of his duties. Thus, even under the pre-1972 Act, most claimants with occupational diseases could introduce evidence of some exposure to injurious stimuli "upon the navigable waters," which would suffice for coverage purposes and would obviate any need to argue that the 1972 amendments were retroactive.

Indeed, for that very reason the Director does not disagree with the result reached by the court of appeals, even though the court's reasoning was flawed. The Director argued below that the record indicates that

Peterson was exposed to asbestos while aboard submarines. Accordingly, in the Director's view, Peterson satisfied the pre-1972 situs requirement, and an award of benefits was appropriate. For this additional reason, review is not warranted.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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